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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1005

STEPHEN H. PAYSON,
Petitioner

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner, Stephen H. Payson, prays that writ of certiorari issue to review the final order of the United States Court of Claims of June 8, 1965, for summary judgment, and the order of court of November 12, 1965, denying petitioner's motion for rehearing, whereby respondent's motion for summary judgment was granted and the claim filed by the petitioner was dismissed in that court.

THE OPINION BELOW

The Order of the United States Court of Claims of June 8, 1965, granting respondent's motion for summary judgment, printed on page 7 of the Appendix to this petition, is unreported, and the Order of November 12,

1965, denying petitioner's motion for rehearing is printed on page 8 of the Appendix to this petition.

JURISDICTION

The final order of the United States Court of Claims was entered June 8, 1965. Rehearing was denied November 12, 1965. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the U.S. Court of Claims can refuse to hear an issue by reason of collateral estoppel as having been determined by a U.S. District Court and Court of Appeals, when the latter courts had *also* refused to consider the issue as beyond their jurisdiction.

2. Whether the doctrine of *res judicata* extinguishes the judicial reviewability of an administrative action involving essentially the same factual situation and parties as were considered in a court action antedating the administrative action.

STATEMENT OF THE CASE

This is the petitioner's second petition to this Court. The first was in *Robinson* v. *Franke* and *Payson* v. *Franke*, No. 615, October Term, 1960, *Transcript of Records and File Copies of Briefs*, 1960, Vol. 159, Cases Nos. 604 to 615. This petition was denied February 20, 1961.

A pertinent issue in the case was whether the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit could review for arbitrariness or abuse of discretion the action of a Navy Selection Board which selected the petitioners for discharge as unsatisfactory. On this issue, the respondent in its Brief for Respondent in Opposition represented to this Court on page 13:

The court below correctly held, relying on *Creary* v. *Weeks*, 259 U.S. 336, that there is no judicial review of a Navy selection board's determinations.

Following the denial of the petition for a writ of certiorari by this Court, both petitioners (Robinson and Payson) applied to the Board for Correction of Naval Records. In the meanwhile it had been discovered that the action of the selection board which had reported the petitioners unsatisfactory had not been reviewed by the Judge Advocate General of the Navy to determine whether a legal basis existed for the findings concerning petitioners as required by directions of the Secretary of the Navy and in view of 10 U.S.C. 5148. This circumstance with others was presented to the Correction Board which acted favorably with respect to the petitioner, Robinson, but not as to the then and present petitioner, Payson. The petition presented to the U.S. Court of Claims alleged, *inter alia*, the above-noted procedural defect (R. 4) and that the action of the Board for Correction of Naval Records was arbitrary and capricious as to the instant petitioner (R. 8).

It was pointed out to the U.S. Court of Claims (R. 25-26):

> Although both *Robinson* and *Payson* had been considered at the same time by the same Selection Board and their cases appear legally identical, the Board for Correction of Naval Records saw fit to act favorably in the case of *Robinson* and unfavorably in the case of *Payson*. Just why this inconsistent action was taken is very difficult to say. Robinson was a former prisoner of war and also the son of a retired Navy admiral, but these circumstances should have no bearing on the legal issues.

The respondent moved for Summary Judgment on the ground that the factual issues had been resolved by the U.S. District Court and were *res judicata* to the Court of

Claims. The respondent's argument on such motion concluded:

> Plaintiff's suit is based upon the same facts and involves the same issues as presented to the District Court, and the decision by the Court of Appeals, affirming the District Court, found that the discharge of plaintiff was legal and proper in every respect. Accordingly, plaintiff's petition should be dismissed on the grounds of collateral estoppel.

No constitutional provisions, treaties, statues, ordinances, or regulations are considered sufficiently specific to the issues raised to warrant their citation pursuant to Rule 40. The statutory provisions upon which the petition to the Court of Claims rested are set forth on page 8 of the record. Authorization for the correction boards is at 10 U.S.C. 1552.

REASONS FOR GRANTING THE WRIT

1. While it probably is of relatively small import to this Court whether the petitioner eventually succeeds or fails to demonstrate the illegality of his discharge in a judicial proceeding, it should be of considerable import that his opportunity to do so not be restricted. This was emphasized in the earlier petition, and although that petition was denied, judicial reviewability of similar military determinations was subsequently indicated as appropriate in *Beard* v. *Stahr*, 1962, 370 U.S. 41, and the Court of Claims found an officer's discharge illegal in *Edward W. Cole* v. *U.S.*, No. 112-63, decided June 11, 1965.

2. Respondent first told this Court that the Court of Appeals held that it could not review the selection board's determinations and then indicated to the Court of Claims that the Court of Appeals had passed on the legality of petitioner's discharge. Either respondent is guilty of duplicity or the lower court's decision means that the District Court's refusal to look behind the action of the Selection

Board is nevertheless *res judicata* on that issue to another tribunal of otherwise competent jurisdiction to review same. The former should not be tolerated. The latter effectively places individuals such as petitioner in a judicial shell game.

3. We have here a case where a court refused to review action by an administrative body on the basis of a previous court decision. Assuming that the District Court had acted upon the merits of petitioner's case, an interesting and novel question arises as to whether the doctrine of collateral estoppel should embrace the subsequent administrative action. The Court of Claims has held in the affirmative. However, there is little in the way of guidelines and there are many questions. For example, does the rule apply irrespective of whether the administrative body agrees or disagrees with the court action? Does it apply where different evidence is adduced? Is the rule different for a continuing claim?

It is submitted that the correct rule is that a previous court action should be immaterial on the issue of judicial reviewability of an administrative body, at least to the extent that jurisdiction was exercised by the latter. In the ultimate, it would seem that the court, not the administrative body, should have the last review. On the other hand, should a litigant be permitted to flit endlessly between administrative bodies and the courts? It is not a simple problem but one which Petitioner feels merits this Court's serious consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this writ of certiorari should be granted.

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 201-64

STEPHEN H. PAYSON

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion for summary judgment. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, and without oral argument,

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted and the petition is dismissed except with regard to plaintiff's claim for the period between July 1, 1958, and the date of his discharge. Plaintiff is granted leave to file a motion for summary judgment to recover pay between July 1, 1958, and the date of his discharge.

BY THE COURT

WILSON COWEN
Chief Judge

June 8, 1965

Judge Davis took no part in the consideration and decision of this case.

IN THE UNITED STATES COURT OF CLAIMS

464-61 ANTHONY P. MILLER, INC.

16-62 THE KEMODE MANUFACTURING CO., INC. AND FRANK A. PETRAGLIA

201-64 STEPHEN H. PAYSON

v.

THE UNITED STATES

ORDER

These cases come before the court on motions for rehearing, reconsideration, for leave to argue on exceptions and for further relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this 12th day of November 1965, that said motions be and the same are denied as follows:

464-61 Anthony P. Miller, Inc. Defendant's motion.

16-62 The Kemode Manufacturing Co., Inc. and Frank A. Petraglia. Plaintiff's motion.

201-64 Stephen H. Payson. Plaintiff's motion.

BY THE COURT

WILSON COWEN
Chief Judge

Judge Davis took no part in the consideration and decision of No. 201-64.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1005

STEPHEN H. PAYSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 24, 1957, a Navy Selection Board was convened to review the records of certain officers in the Civil Engineer Corps of the Navy who were eligible for promotion to the grade of captain. The Board found that petitioner and two others were not qualified for continued service in the Navy (they had not performed satisfactorily in their present grade and would not satisfactorily perform the duties of a higher grade). The Chief of Naval Operations concurred in the report, which was thereafter approved by the Secretary of the Navy, the Secretary of Defense, and, finally, the President. Consequently, petitioner, who had less than twenty years of service,

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was honorably discharged from the Navy on July 18, 1958. He then brought suit for a declaratory judgment in the district court alleging that the Board's decision was a nullity because (1) it was arbitrary and capricious and without basis in his military record and (2) petitioner had completed twenty years of commissioned service and was therefore not subject to removal by a selection board. On cross-motions for summary judgment, the district court entered judgment for the government. The court of appeals affirmed (*Payson* v. *Franke,* 282 F. 2d 851 (C.A.D.C.)), holding, *inter alia,* that petitioner had not achieved twenty years' service, and that his separation from the service had been properly accomplished. While noting that it was not its function "to reassess the appellant's performance record," the court of appeals stated that "[v]arious references therein may well have appeared to an expert body [the Selection Board] to suggest an adequate basis for the conclusion which was reached" (282 F. 2d at 854). A petition for a writ of certiorari was denied on February 20, 1961 (365 U.S. 815).[1]

Petitioner then applied to the Board for Correction of Naval Records to have his record changed to show that he had been retained on active duty until completion of twenty years' duty and had retired voluntarily under 10 U.S.C. 6325. His application was denied on March 27, 1964. On June 30, 1964, he filed suit in the Court of Claims to recover active duty pay from July 1,

[1] Petitioner had filed his petition along with James B. Robinson, another discharged naval officer.

1958, to the date of judgment (less severance pay which he had received). Petitioner alleged that his discharge from the Navy was invalid, and that the action of the Board for Correction of Navy Records was arbitrary and capricious. On the government's motion for summary judgment, the Court of Claims dismissed the action except that portion of the claim for the period between July 1, 1958, and the date of petitioner's discharge (Pet. App. 7). Petitioner's motion for rehearing was denied on November 12, 1965 (Pet. App. 8).

The Court of Claims properly rejected petitioner's claim for active duty pay for the period subsequent to his separation from the service. His right to such relief is wholly dependent on whether he was legally discharged. That question was decided against him in the previous district court suit, and petitioner is barred from relitigating it in the Court of Claims. See *McGinty* v. *United States,* 151 Ct. Cl. 399, 403, certiorari denied, 368 U.S. 867. Cf. *Commissioner* v. *Sunnen,* 333 U.S. 591, 597–598. The bar was not lifted simply by reason of the fact that petitioner—after the action of the Selection Board which was the subject of judicial review—submitted his case to the Correction Board for further administrative consideration. Since the Correction Board's adverse decision on petitioner's application added nothing to the prior adverse final judgment in the district court suit, it could not serve as a basis for re-trying the merits of the cause of action "stemming from the same events or transactions." See *Friedman* v. *United*

States, 310 F. 2d 381, 400–401 (C. Cls.), certiorari denied *sub nom. Lipp* v. *United States,* 373 U.S. 932. In these circumstances, there is no sound reason for failing to apply the normal principles of *res judicata* and collateral estoppel. *Ibid.*

Petitioner points out (Pet. 3) that the Correction Board acted favorably on the application of former Commander Robinson who had also been involuntarily separated from the Navy. Petitioner seems to suggest, but does not argue, that this factor establishes an independent ground for reviewing the Correction Board's decision to determine whether petitioner, whose record was similar to Robinson's, was arbitrarily denied relief. The short answer is that the decision in Robinson's case does not affect petitioner's rights. There are always differences in individual records which the Correction Board may take into account in determining if military action, although legally proper, was unjust under particular circumstances. In petitioner's case, the Board concluded that petitioner failed to demonstrate an injustice warranting corrective action. That was a matter committed solely to it.[2]

It is therefore respectfully submitted that the petition for certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

[2] The courts have no comparable discretionary equity power in reviewing military decisions or Correction Board decisions. Judicial review is limited to the question whether the military agency followed the pertinent procedural and substantive rules. See *Creary* v. *Weeks,* 259 U.S. 336.

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